United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-2020

TO BE ARGUED BY:
Robert E. White, Esq.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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JOSEPH JOHN BUTLER

Petitioner- Appellant

- against

ROY F. LOMBARD,
GREENHAVEN CORRECTIONAL FACILITY

Respondent-Appellee

----------x

DOCKET NO. 77-2020

On Appeal from the United States District Court

for the Eastern District of New York

BRIEF FOR PETITIONER-APPELLANT

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TABLE OF CONTENTS

	PAGE NO.
Table of Authorities	i
Preliminary Statement	1
Opinion or Order Below	2
The Issues Presented	3
Statement of the Case	4
Statement of Facts	5

ARGUMENT

Point One - The so-called Knickerbocker rule which was used to convict petitioner of burglary did not meet due process of law requirements. 10

Point Two - The State of New York violated petitioner's constitutional right not to be twice put in jeopardy of life or limb for the same offense by prosecuting petitioner for burglary after first prosecuting him for possession goods stolen as the result of that burglary. 16

Conclusion 20

TABLE OF AUTHORITIES

A. CASES

	Page No.
Ashe v. Swenson, 397 US 436 (1970)	18,19
Barnes v. United States, 412 US 837 (1973)	10,11,12,13,14
Benton v. Maryland, 395 US 784 (1969)	16
Grafton v. United States, 206 US 333 (1907)	17
Knickerbocker v. People, 43 NY 177 (1870)	10,11,13,15,19
Reynolds v. Sims, 377 US 533 (1964)	18
Waller v. Florida, 397 US 387 (1970)	17,18

B. OTHER AUTHORITIES

Annot., 25 L. Ed. 2d 968, 970 (1970)	16

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PRELIMINARY STATEMENT

This is an appeal from an order dismissing a petition for a Writ of Habeas Corpus entered on December 10, 1976, by the Honorable George C. Pratt, Judge of the United States District Court for the Eastern District of New York. The order and opinion are unreported and are reproduced at pages one through six of the Appendix.

In the District Court, the petitioner-appellant proceeded in forma pauperis and was represented by James J. McDonough, Attorney in Charge, Legal Aid Society, Nassau County, NY who is continuing to represent the petitioner-appellant in this Court.

OPINION AND ORDER BELOW

On December 10, 1976, the United States District Court for the Eastern District of New York (Pratt, J.) filed a memorandum of decision and order dismissing the petition for a writ of habeas corpus (see pp. 1 through 6 of appendix for complete decision). Petitioner had advanced two claims: (1) the use of the so-called Knickerbocker rule to convict him of burglary violated his right to due process of law and (2) the prosecution of petitioner for burglary violated his right against double jeopardy. The Court felt that considering all the circumstances of the case the use of the Knickerbocker rule did not permit petitioner's conviction to rest on grounds so tenuous as to violate his right to due process of law. The court found no violation of double jeopardy rights relying on the "same evidence" test rather than the "same transaction" test.

THE ISSUES PRESENTED

1. Was the so-called Knickerbocker rule used in such a manner as to violate due process of law requirements?

2. Did the State of New York violate petitioner's right against double jeopardy by prosecuting him for burglary after first prosecuting him for possessing goods stolen as a result of that burglary.

STATEMENT OF CASE

On April 24, 1973, relator was convicted after trial in the County Court of Nassau County, NY, (Tomson, J.) of the crime of burglary and was sentenced to an indeterminate term of imprisonment not to exceed five years.

Relator contends that it was constitutional error to use the so-called Knickerbocker rule to convict him of burglary and it was also constitutional error to prosecute him for burglary of premises after he had been earlier charged and convicted for possessing the property stolen as a result of that burglary.

Relator has raised these claims in the state courts and has exhausted his state remedies.

On June 28, 1976, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York based upon the above contentions (A 9). By an order dated December 8, 1976, the petitioner was denied (Pratt, J.)(A1-6). A certificate of probable cause was issued by the Eastern District Court on January 4, 1977 (A8) and a notice of appeals was timely served and filed (A7).

STATEMENT OF FACTS

On April 3, 1972, at about 11:00 PM, relator was arrested by the Suffolk County Police for driving an automobile with a forged driver's license. Within two hours and during the course of an inventory search of relator's automobile, the Suffolk County Police learned that certain tools found in relator's automobile had been stolen during a burglary at a cemetery in adjoining Nassau County earlier that evening. While at the Suffolk County Police stationhouse immediately after his arrest, relator was interviewed by both Nassau County and Suffolk County Police and relator admitted that he knew the goods were stolen property but denied taking part in the burglary. He explained to the police that in exchange for $20.00 he had agreed to transport the tools to Suffolk County for a man called "Callahan" who had approached relator in a Nassau County diner earlier that evening complaining that his automobile had become disabled. "Callahan", a passenger in relator's automobile when initially stopped by the police, excaped and was never found by the police.

Relator was charged with criminal possession of stolen property by the Suffolk County Police and on April 10, 1972, relator pled guilty to criminal possession of stolen property and was subsequently sentenced to one year in the Suffolk County Jail.

On November 9, 1972, relator was indicted for the same incident in Nassau County and charged with burglary and grand larceny. The grand larceny charge was dismissed by the Nassau County Court on grounds of double jeopardy but the burglary charge was not.

After completely serving his sentence in Suffolk County relator was convicted after jury trial in Nassau County on April 24, 1973, of burglary and subsequently sentenced to an indeterminate sentence not to exceed five years.

At his trial in Nassau County, the so-called Knickerbocker rule was used to convict relator. After the opening statements by the district attorney, the following colloquy occurred between defense counsel and the court:

> MR. WOLSTEIN: Your Honor, based upon the People's opeining statement at this time and what they have said they will prove to the jury or try to prove to the jury, it is the defense's contention that under those circumstances there would not be enough evidence to go to the jury on this case from what the People have shown they intend to prove for the jury to be given the question. It is our contention, Your Honor, that this case should be dismissed on the ground that the mere fact of possession of the items is circumstantial evidence of the recent and exclusive possession of these items that were allegedly taken from this warehouse is not enough to be given to the jury.
>
> THE COURT: That motion is denied.
>
> Since we have discussed this matter, I have read quite a few cases. I don't think it would serve any useful purpose to refer to all of them. I think at this point it perhaps would be sufficient if I indicated that Knickerbocker against People, 43 NYS 177, which is a burglary case, is still

good law, and it has been followed without any real variation since that time. There have been a few cases where it has been held that on the peculiar facts in those cases the inferences and presumptions from recent and exclusive possession, or, rather, the principle would not justify a conclusion that the defendant was guilty in those particular cases on the peculiar facts in each of those cases, but the principle in the Knickerbocker case is still good law and on the facts as they have been outlined to the jury, it seems to me, there is sufficient, if shown, to make out a jury question.

Your motion is denied. You have an exception.

Later, during the Court's charge, the court made the following statement to the jury:

Now, gentlemen of the jury, we get to what you have heard considerably about, particularly during summations, and that is, what was referred to as a presumption that flows from the recent and exclusive possession of the fruits of a crime. The rule is this:

There is a rebuttable presumption that the recent and exclusive possession of the fruits of a crime, if unexplained, or falsely explained, justifies the inference of guilty. The law permits you to draw this inference, but you are not required to do so. In order for the defendant to explain recent and exclusive possession, some evidence must be elicited. The inference drawn from the presumption of recent and exclusive possession may be overcome without the defendant's testimony, and is not sustainable merely because the defendant did not take the stand. The existence of the inference in no way encroaches upon the well established right of the defendant to refrain from testifying in his own behalf. If you find that the defendant has explained the recent and exclusive possession, then the burden is on the People to prove beyond a reasonable doubt that the explanation is false. The recent and exclusive possession is not required to be proven by direct evidence. Such possession may be inferred from circumstances, but in that instance, the circumstances must be established

by clear and convincing evidence and must be of such a character, or, if true, to exclude to a moral certainty every other inference but that of recent and exclusive possession by the defendant. Of course, you are the -- you and you alone will determine whether or not the defendant had recent and exclusive possession of stolen property.

As I interpreted the opening and summation of the defendant, and the testimony here adduced, there seems to be no real question in this case that the items found in the defendant's car were stolen, and the defendant knew that they were stolen, and it was affirmatively brought out by the defendant that, in fact, the defendant pleaded guilty to criminal possession of stolen merchandise with respect to the very items that were here testified to, it would -- you would still be required, even on those facts, however, to determine whether or not this defendant had recent and exclusive possession of the stolen property before you could determine that the presumption that flows from the recent and exclusive possession applied. Keep in mind also that you would be required to determine what I have just alluded to, and, that is, that this recent and exclusive possession, if you find that there was recent and exclusive possession, was either not explained or was falsely explained.

The term "recent" has its ordinary meaning, but it varies in each case, depending upon the circumstances. It is for you, members of the jury, to decide if the possession of the items found in the car was recent. The term "exclusive" means having the power or effect of excluding -- means owned, used, or controlled by one person, two persons or a group. It does not rule out such possession by two or more persons under appropriate circumstances. In other words, more than one person may have exclusive possession of the stolen property in this case. There is a tendency to think of exclusive as applying to only one person. It can apply to one person, but in ordinary language you heard the word "exclusive" used with respect to more than one person.

> For instance, you refer to an exclusive club. An exclusive club, of course, refers to more than one person. I have said that you and you alone may have the burden of determining the evidence in this case, the facts in this case. In that sense, that is your exclusive function -- not the exclusive function of one of you, but the exclusive function of 12 of you. It is in that sense that exclusive possession is used. If it is used, however, with respect to exclusive possession by more than one person, of course, you would be required to find that the defendant was one of those persons who did have exclusive possession. "Possession" means to have physical possession or otherwise to exercise dominion or control over tangible property. Before you may employ the rebuttable presumption of recent and exclusive possession of the fruits of a crime, the People must prove beyond a reasonable doubt that the defendant had recent possession, and that he alone or with another had exclusive possession of the items found in the defendant's automobile, and that those items were the fruits of a crime. In addition, you must find that the defendant has not explained, through the testimony here in this case, his possession of these stolen items, or has falsely explained it. If you so determine beyond a reasonable doubt, then you may, although you are not required to do so, apply the presumption to determine whether the presumption together with all the other testimony in this case would permit a determination that the People have proven beyond a reasonable doubt that the crime of burglary in the third degree was committed by the defendant, acting alone or in concert with others.
>
> In this case the People ask you to draw the inference of guilt from this presumption, as I have charged it to you, that is, the presumption of recent and exclusive possession of stolen property, and on other circumstantial evidence.

Subsequent to the above burglary conviction, relator has been convicted of another felony and because of the above burglary conviction he has been sentenced under New York State's Prior Felony Offender statute which mandates harsher punishment for such offenders.

ARGUMENT

THE SO-CALLED KNICKERBOCKER RULE WHICH WAS USED TO CONVICT RELATOR OF BURGLARY DID NOT MEET DUE PROCESS OF LAW REQUIREMENTS

In he instant case, the so-called Knickerbocker rule was used to convict relator of burglary. This rule is derived from Knickerbocker v. People, 43 NY 177 (1870) and is as follows:

> recent and exclusive possession of the fruits of a crime, if unexplained or falsely explained, will justify an inference that the possessor is the criminal.

In the instant case, the trial court ruled immediately after the district attorney's opening statement that the above rule was sufficient to convict relator of the crime of burglary and subsequently so informed the jury during the court's charge.

A similar rule was recently examined by the United States Supreme Court in Barnes v. United States, 412 US 837 (1973). In Barnes, the defendant was convicted of possessing United States Treasury checks stolen from the mails, knowing them to be stolen. The trial court instructed the jury that it was justified in inferring from unexplained possession of recently stolen mail that the defendant knew it was stolen when he possessed it. The United States Supreme Court affirmed the defendant's conviction, holding that the court's instruction comported with due process because the inference satisfied the necessary standards:

> What has been established by the cases, however is at least this: that if a statutory inference

> submitted to the jury as sufficient to support conviction satisfies the reasonable doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, [the presumed fact is more likely than not to flow from the proved fact on which it is made to depend] then it clearly accords with due process. Barnes, supra, at 843.

The Barnes Court noted that it was dealing with a long-standing common-law inference blessed with consistent judicial approval but the court warned that "despite that fact"(c)ommon law inferences, like their statutory counterparts, must satisfy due process standards in light of present-day experience." Barnes supra, at 844-45.

The instant case can be differentiated from the Barnes case because, although the same rule is present in both cases, it is used for a different effect. In Barnes, the rule is used to justify an inference that the possessor of stolen goods knew they were stolen. In the instant case, the rule is used to justify an inference that the possessor of the stolen goods broke into a building with the intent to steal those goods.

Using the fact pattern of the instant case which led to relator's arrest, a jury in New York is entitled under the Knickerbocker rule to use the rule in three separate ways: (1) it can use the rule to justify a finding that relator knew the goods he possessed were stolen. This is the exact use of the rule which the Barnes court approved;

(2) a jury could use the rule to infer that relator actually sto the goods; (3) a jury could go even further back in time and events and use the rule to infer that relator actually entered the building unlawfully with the intent to steal those goods, and this is what actually happened in the instant case.

Such a use of the rule does not comport with the due process requirements as explained in Barnes. Certainly the rule could have been properly used to justify conviction of relator fo knowingly possessing stolen property since it comports with the standards set out in Barnes. In the instant case relator even admitted on the very night he was arrested that he knew the goods were stolen, but he denied taking part in the burglary.

When used in relator's burglary prosecution the jury in reality was being asked to make an inference upon an inference upon an inference. It was actually being asked to infer that relator knew the goods were stolen and from that to infer that he actually took part in stealing the goods and from that to infer that he unlawfully entered the building where the goods were kept with the intent to steal those goods. The connection between possessing stolen goods and the inference that the possessor committed a burglary at an earlier time and place is a much more tenuous one than the simple inference that one who possesses stol goods knows they are stolen. The most obvious example is the "fence" who knows or should reasonable know that the goods he

possesses are stolen. No one can seriously argue that the "fence" is guilty of the initial crime which resulted in the goods being stolen; yet the Knickerbocker rule would permit a conviction of the fence for that initial crime in addition to the crime of possessing stolen property.

The Knickerbocker rule as applied to burglaries not only fails to meet the standards set out in Barnes, but can not even be justified any longer on policy grounds. Policy plays a large role in the Knickerbocker rule as the court itself in Knickerbocker makes clear:

> It has been justly remarked that the necessity of admitting circumstantial evidence is more obvious in criminal than in civil cases; for the probability of proving the matter by direct evidence is much more difficult in the former. Crime is usually committed in secret. No witness is called to a burglary; and unless resort he had to presumptive or circumstantial evidence, the crimes most dangerous to society will go unpunished. This this evidence of possession or stolen goods may possibly lead to error, is only saying that human tribunals may err. . . . there is very little danger to the innocent from this rule of evidence which has been followed for centuries; innocence so readily asserts itself. Its abrogation would greatly weaken the power of criminal prosecutions, which are already sufficiently weak. Knickerbocker v. People, 43 NY at 182-83.

In other words, as of 1870, the prosecution in most cases would not be able to prove the crime of burglary without the presumptio and the criminal would go free. That policy, despite whatever

validity it may have had in earlier centuries, no longer applies in the last quarter of the twentieth century.

Initially, it is plain after Barnes that the possessor is liable for conviction of the crime of possessing stolen property and consequently does not go unpunished. More important however, is that the "keystone cop" era of police investigation has ended. The district attorney and police officers who investigated Mr. Knickerbocker's burglary over a hundred years ago would be astounded by the techniques available to the prosecution today. Fingerprints now play a major role in police investigation across the nation. The modern prosecution team is well-stocked with computers and lie detectors and large police forces. The average police officer of today receives extensive training and it is commonplace for such officers to have a college education. Every major police headquarters has a scientific laboratory with highly skilled technicians to man. If the local police force needs help it is available, not only from larger police forces nearby, but from the national police (FBI) in Washington, D.C., as well. In short, the nature of the exigency which resulted in the rule being applied to burglary prosecutions in past centuries has changed. It has outlived its usefulness, not because it is not useful to prosecute but because it is not useful in obtaining substantial justice. In fact, one result of the rule in the 1970's is to foster sloppiness and inertia on the part of the prosecution team, because once the possessor has been arrested the prosecution can

relax and consider its work done. There is no pressing urgency to aggressively follow up any leads as to who actually committed the burglary because the Knickerbocker rule already provides the answer whether the answer it gives be true or false.

We see the result of the Knickerbocker rule in the instant case. There were several instances where relevant evidence was lost or leads not followed up on. A bottle of liquor found at the scene of the burglary, a glove also found at the scene, and relator's allegedly forged driver's license were all either lost or "thrown in the garbage" by the police. The passenger who escaped from relator's automobile and who relator, in effect, accused of being the real burglary was never apprehended by police. A fingerprint investigation of the passenger side of relator's car may have borne fruit, but it was apparently not even considered; nor did the police bother to fingerprint the metal tool boxes that the burglar removed from the premises. Two partial footprints found at the scene of the crime were never investigated. All these things happened in the 1970's despite all the technical advances the police have made since 1870 and this caliber of investigation will continue so long as the Knickerbocker rule remains applicable to the crime of burglary.

POINT TWO

THE STATE OF NEW YORK VIOLATED RELATOR'S CONSTITUTIONAL RIGHT NOT TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB FOR THE SAME OFFENSE BY PROSECUTING RELATOR FOR BURGLARY AFTER THE STATE HAD ALREADY PROSECUTED HIM FOR POSSESSING GOODS STOLEN AS THE RESULT OF THAT BURGLARY.

The provision contained in the Fifth Amendment to the United States Constitution that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb" is applicable to state prosecutions through the Fourteenth Amendment. Benton v. Maryland, 395 US 784 (1969). The double jeopardy provision has several objectives which have been sumarized as follows:

> the restriction on multiple prosecutions... is designed to implement several procedural objectives, one of these being the protection of both the defendant and the public from the expense of prolonged and unnecesssary litigation due to the retrial of previously adjudicated issues or to the use of several proceedings to try questions of law and fact that logically make up a single case, and another objective being to safeguard the accused from the excessive harassment and stigma of repeated criminal prosecutions; a defendant once acquitted or convicted should be able to consider the matter closed and plan his life ahead without the threat of subsequent prosecution and possible imprisonment for the same conduct.

Annot., 25 L. Ed. 2d 968, 970 (1970). None of these objectives were fulfilled in the instant case.

In interpreting the meaning of the double jeopardy clause the United States Supreme Court has given its stamp of approval to successive prosecution of a person in both federal

court and state court for the same offense where the first trial resulted in a conviction because the federal and state governments are separate sovereigns. Bartkus v. Illinois, 359 US 12 (1959). A corollary to this is that successive prosecution for the same offense by successive federal courts or successive state courts are not permitted because in those instances both courts are "arms of the same sovereign." Grafton v. United States, 206 US 333 (1907); Waller v. Florida, 397 US 387 (1970).

It is the Waller decision that is most on point with the instant case. In Waller, the defendant was charged with violating two municipal ordinances of St. Petersburg, Florida, because he removed a mural from City Hall. He was found guilty in municipal court on both counts--destruction of city property and disorderly conduct--and sentenced to 180 days in the County jail. The defendant was then indicted for grand larceny by the state of Florida for the same acts and, after jury trial in the Circuit Court of Florida, was found guilty.

Assuming that the ordinance violations were included offenses of the felony and that the felony charge and ordinance violations were based on the same acts, the Waller Court held that the second trial constituted double jeopardy because the power to try the defendant in the municipal court derived from the same source as the power to try the defendant in circuit court--

the state constitution. The Waller Court, at 393, noted:

> "Political subdivisions of States--counties, cities, or whatever--never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." Reynolds v. Sims, 377 US 533, 575, 84 S.Ct. 1362, 1388 12 L. Ed. 2d 506 (1964).

We have essentially the same situation in the instant case. The State of New York has seen fit to create artificial boundaries within its environs and call areas so marked out "counties", with each county given the authority to prosecute offenses within its jurisdiction. All County Courts derive thei power from the same source. See McKinney's Const. Art. 6, §10. In the instant case, relator allegedly broke into a cemetery and stole some tools in Nassau County and was apprehended in Suffolk County. Rather than one county handling the entire prosecution, the counties divided it up, first prosecuting relator in one county and then, after obtaining a conviction, prosecuting relato again in the second county. Under Waller, such double prosecutio is forbidden.

The question arises as to which test to use to determine whether the "same offense" was prosecuted in both counties. Relator submits that the test which best comports with the objectives of the Fifth Amendment double jeopardy clause is the "same transaction" test. This test as explained in the concurrin opinion of Justice Brennan in Ashe v. Swenson, 397 US 436 (1970),

at 452-53 is as follows:

> In my view, the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurence, episode, or transaction. This "same transaction" test of "same offense" not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience. Modern rules of criminal and civil procedure reflect this recognition...Although in 1935 the American Law Institution adopted the "same evidence" test, it has since replaced it with the "same transaction" test. England, too, has ...adopted the "same transaction" test. (footnotes omitted).

Justice Brennan in his concurring opinion in Ashe v. Swenson, supra, reviewed the history of the "same evidence" test Is the same evidence which is required to convict defendant in his first prosecution all that is required to convict him of another charge in the second prosecution?] extensively and rejected it for the "same transaction" test. Relator submits that even if the harsh and outmoded "strict evidence" test were to be used as justification for double prosecution he still has been placed in double jeopardy because in both prosecutions, the so-called Knickerbocker rule, which is attacked on due process of law grounds supra, was all that would be necessary to sustain conviction of both offenses.

CONCLUSION

FOR THE ABOVE-STATED REASONS THIS COURT SHOULD REVERSE THE ORDER OF THE DISTRICT COURT AND GRANT THE PETITION.

Respectfully submitted,

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